

LIBRARY

SUPREME COURT, U. S.

FILED

JUN 5 1968

APPENDIX

JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 38

JAMES G. GLOVER, et al.,

Petitioners,

—v.—

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, et al.,

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. Central 1-4477.

PETITION FOR CERTIORARI FILED MARCH 4, 1968

CERTIORARI GRANTED APRIL 22, 1968

**UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT**

No. 24,288

JAMES G. GLOVER, ET. AL.,

Appellants,

versus

**ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
ET. AL.,**

Appellees.

**Appeal from the United States District Court for the
Northern District of Alabama.**

INDEX.

	Page
Docket Entries	1
Complaint	3
Motion to Dismiss, by St. Louis-San Francisco Ry. Co.	8
Motion to Dismiss, by Brotherhood of Railway Car- men of America	10
Amended Motion to Dismiss, by St. Louis-San Fran- cisco Ry. Co.	10
Amended Motion to Dismiss, by Brotherhood of Rail- way Carmen of America	10

Memorandum Opinion	14
Order in Conformity with Memorandum Opinion to Dismiss Action	16
Motion to Set Aside or to Amend Order of Dismissal	16
Order Granting Leave to Amend Complaint	18
Amendment to Complaint	18
Motion to Dismiss Amendment to Complaint and to Adhere to Order of Dismissal	21
Motion to Dismiss Amendment to Complaint	22
Order Dismissing Amended Complaint	24
Notice of Appeal	25
Appeal Bond	26
Clerk's Certificate	27
Opinion of United States Court of Appeals for the Fifth Circuit	28
Judgment of the Court of Appeals	29

APPENDIX.

RELEVANT DOCKET ENTRIES.

Date	Filings-Proceedings
12/12/66	Docketing Cause, Etc.
12/12/66	Flg. Record on Appeal.
12/12/66	Flg. Appearance for Appellants.
12/12/66	Flg. Letter of Appellant for withdrawal of Record for the Purpose of Printing (E. S. Upton Printing Co.).
12/19/66	Flg. Appearance for Appellees (2).
12/22/66	Flg. Appearance for Appellee.
1/18/67	Flg. 15 Printed copies of the Record.
2/17/67	Flg. Brief of Appellants with c/s (20 printed copies).
3/ 2/67	Flg. Letter Request for extension of time for filing Union Appellee's Brief Granted to 3/31/67 (GFG).
3/ 8/67	Flg. Motion for extension of time for filing Railway Appellee's Brief. Granted to 3/23/67.
3/23/67	Flg. Brief for Appellee, St. Louis-San Francisco Railway Company with c/s (20 printed copies).
3/30/67	Flg. Brief of Appellee, Brotherhood of Railway Carmen of America with c/s (20 printed copies).

- 5/ 5/67 Flg. Appearance for appellee (Bro. Elwy. Car-
men of Am.).
- 5/23/67 Flg. Appearance for appellant.
- 6/ 2/67 Flg. Reply Brief for Appellants with c/s (20
printed copies).
- 8/ 9/67 Ordered Assigned Thursday, October 19, 1967
at Montgomery.
- 10/19/67 Flg. Appearance for Appellee.
- 10/19/67 Entg. Argument & Submission before Js. Rives,
Goldberg & Dyer.
- 12/ 5/67 Affirmed "Per Curiam" (RTR).
- 12/27/67 Judgment as Mandate issued to Clerk, Bir-
mingham, Ala.
- 12/27/67 Record on appeal returned to Clerk, Birming-
ham, Ala.
- 2/21/68 Preparing and Certifying Proceedings on Cer-
tiorari.
- 3/ 7/68 Flg. Notice (P. C.) of Clerk of S. C. of filing
for certiorari.
- 4/26/68 Flg. Order of S. C. granting the petition for
cetrriorari.
-

COMPLAINT.

Filed Jul. 13, 1965.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION.

Civil Case No. CA 65-477.

JAMES G. GLOVER, JAMES C. DENT, WILLIAM H.
GREENE, JR., PAUL CAIN, ODELL BARMORE,
CAREY GOODEN, MATTHEW C. PAYNE, JOHN
E. JEFFRIES, ALBERT L. BOYD, BUSTER
WRIGHT, VINCENT P. PIAZZA, JIMMIE O.
WILEY, HOWARD D. KEPLINGER, JR., and SAM
J. GUGLIOTTA,

Plaintiffs,

versus

ST. LOUIS-SAN FRANCISCO RAILROAD COMPANY,
a Corporation, and BROTHERHOOD OF RAILWAY
CARMEN OF AMERICA, an unincorporated asso-
ciation,

Defendants.

Come now James G. Glover, James C. Dent, William H. Greene, Jr., Paul Cain, Odell Barmore, Carey Gooden, Matthew C. Payne, John E. Jeffries, Albert L. Boyd, Buster Wright, Vincent P. Piazza, Jimmie O. Wiley, Howard D. Keplinger, Jr., and Sam J. Gugliotta, and invoke the jurisdiction of this Honorable Court because of the diversity of citizenship of the parties, because there is a federal question involved, and because of the amount of damages claimed, as will hereinafter more fully appear.

Plaintiffs respectfully show unto the Court the following facts, viz.:

1. Plaintiff James G. Glover is a resident citizen of the State of Alabama, his residence address being 616—11th Court, West, Birmingham, Alabama. Plaintiff James C. Dent is a resident citizen of the State of Alabama, his residence address being 328—10th Avenue, S. W., Birmingham, Alabama. Plaintiff William H. Greene, Jr., is a resident citizen of the State of Alabama, his residence address being 1202 North Cahaba Street, Birmingham, Alabama. Plaintiff Paul Cain is a resident citizen of the State of Alabama, his residence address being 312 Miles Avenue, Birmingham, Alabama. Plaintiff Odell Barmore is a resident citizen of the State of New York, his residence address being "O" Lee Place, Freeport, Long Island, New York. Plaintiff Carey Gooden is a resident citizen of the State of Alabama, his residence address being 4429—45th Avenue, North, Birmingham, Alabama. Plaintiff Matthew C. Payne is a resident citizen of the State of Alabama, his residence address being 520 Mildrn Avenue, Birmingham, Alabama. Plaintiff John E. Jeffries is a resident citizen of the State of Alabama, his residence address being 809 Center Place, S. W., Birmingham, Alabama. Plaintiff Albert L. Boyd is a resident citizen of the State of Alabama, his residence address being 1315 Hudson Avenue, Bessemer, Alabama. Plaintiff Buster Wright is a resident citizen of the State of Alabama, his residence address being Route 2, Millport, Alabama. Plaintiff Vincent P. Piazza is a resident citizen of the State of Alabama, his residence address being 120 Bonita Drive, Birmingham, Alabama. Plaintiff Jimmie O. Wiley is a resident citizen of the State of Alabama, his residence address being Dora, Alabama. Plaintiff Howard D. Keplinger, Jr., is a resident citizen of the State of Alabama, his residence address being 7400—52nd Court, North, Birmingham, Alabama. Plaintiff Sam J. Gugliotta is a resident citizen of

the State of Alabama, his residence address being 1409 Creel Street, Birmingham, Alabama.

2. Defendant St. Louis-San Francisco Railroad Company (hereinafter referred to as the Frisco) is a corporation, incorporated under the laws of the State of Missouri but which does business in the State of Alabama and in Jefferson County, Alabama, and has a place of business located at 30 South 18th Street, Birmingham, Alabama, and is subject to process by service on Mr. Drayton T. Scott, First National Building, Birmingham, Alabama, who is the statutory agent designated by the Frisco pursuant to Title 7, § 144, of the Code of Alabama of 1940, as amended. Defendant, Brotherhood of Railway Carmen of America (hereinafter referred to as the Brotherhood), is an unincorporated association, with its national office located in Kansas City, State of Missouri. The Brotherhood does business and has members residing in the State of Alabama and in Jefferson County, Alabama, and is subject to process by service on Mr. John L. Busby, 5731 Third Avenue, North, Birmingham, Alabama, who is the statutory agent designated by the Brotherhood pursuant to Title 7, § 144, of the Code of Alabama of 1940, as amended.

3. Plaintiffs are all employees of defendant Frisco and are classified as Carmen Helpers, also referred to by all of the parties as "Upgrade Carmen." Their job is and has been generally to repair and maintain passenger and freight cars for defendant Frisco in the yard located at Birmingham, Alabama. They are all qualified by experience to do the work of Carmen, a classification to which none of plaintiffs has been promoted. Plaintiffs are all carried on the Carmen Helpers seniority roster of the defendant Frisco with seniority dates as follows:

Name—Seniority Date

James G. Glover—May 8, 1944.

James C. Dent—July 4, 1944.

William H. Greene, Jr.—July 26, 1948.

Paul Cain—September 5, 1948.

Odell Barmore—November 5, 1951.

Carey Gooden—January 12, 1952.

Matthew C. Payne—February 29, 1952.

John E. Jeffries—April 24, 1952.

Albert L. Boyd—April 7, 1953.

Buster Wright—April 16, 1953.

Vincent P. Piazza—June 2, 1953.

Jimmie O. Wiley—June 6, 1956.

Howard D. Keplinger, Jr.—September 11, 1956.

Sam J. Gugliotta—October 10, 1956.

4. Plaintiffs Glover, Dent, Greene, Cain, Barmore, Gooden, Payne, and Jeffries are all Negroes. The remaining plaintiffs are white men. All of the Negro plaintiffs are carried on the seniority roster higher than the white plaintiffs.

5. Plaintiffs are all in theory, represented by defendant Brotherhood, and their wages, working conditions, and other employment rights are covered by a Collective Bargaining Agreement executed on their behalf by the Brotherhood and the Frisco on, to-wit, January 1, 1945, and amended on, to-wit, June 1, 1952.

6. In order to avoid calling out Negro plaintiffs to work as Carmen and to avoid promoting Negro plaintiffs to Car-

men, in accordance with a tacit understanding between defendants and a subrosa agreement between the Frisco and certain officials of the Brotherhood, defendant Frisco has for a considerable period of time used so-called "apprentices" to do the work of Carmen instead of calling out plaintiffs to do said work as required by the Collective Bargaining Agreement as properly and customarily interpreted; and the Frisco has used this means to avoid giving plaintiffs work at Carmen wage scale and permanent jobs in the classification of Carmen. This denial to plaintiffs of work as Carmen has been contrary to previous custom and practice by defendants in regard to seniority as far as "Upgrade Carmen" are concerned. Defendant Frisco is not calling any of plaintiffs to work as Carmen in order to avoid having to promote any Negroes to Carmen.

7. Because of the nature of their claim and the failure of defendant Brotherhood to institute any grievance on their behalf, the remedies, if any, provided by grievance machinery in the Collective Bargaining Agreement, the grievance machinery in the constitution of the Brotherhood, and the procedure before the National Railroad Adjustment Board, are all wholly inadequate.

8. Plaintiffs aver that they are the victims of an invidious racial discrimination, and each plaintiff has lost wages in excess of \$10,000 as a result of the said discrimination in that they have not been correctly called out to work as Carmen and have not been promoted to Carmen when there have been openings for work and promotion in the Carmen work classification.

9. Plaintiffs bring this action both separately and severally, as a class action, and pray both for the fixing of individual damages and for equitable relief in the form of an injunction to cause defendants to cease and desist from

the aforesaid discrimination in all its aspects. Plaintiffs pray for any further, or different relief as may be meet and proper in the premises.

WILLIAM M. ACKER, JR.,
(William M. Ackér, Jr.),
CARL ISAACS,
(Carl Isaacs),
Attorneys for Plaintiffs.

Of Counsel:

SMYER, WHITE, REID & ACKER,
Sixth Floor, Title Building,
Birmingham, Alabama.

MOTION TO DISMISS.

Filed Sep. 2, 1965.

(Title Omitted.)

Comes now individual defendant, St. Louis-San Francisco Railway Company, and respectfully moves this Court to dismiss the above styled action, and as its grounds therefor states that:

1. Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

2. Plaintiffs' Complaint complains of and brings into issue matters over which Congress has delegated exclusive jurisdiction to the National Railroad Adjustment Board.

3. Plaintiffs' Complaint on its face reveals that plaintiffs have collectively and individually failed to exhaust administrative remedies admittedly available to them.

4. Plaintiffs' Complaint has failed to allege proper Federal jurisdiction.

5. Plaintiffs' Complaint has completely failed to allege any facts or circumstances which support plaintiffs' conclusionary claim that they are entitled to work as carmen rather than carmen helpers, which position they admittedly are filling.

6. Plaintiffs have failed to allege any complaint against this defendant over which this Court has jurisdiction, the Complaint stating merely alleged wrongful acts performed by co-defendant.

7. Plaintiffs' Complaint completely lacks necessary allegations to constitute a proper class action.

PAUL R. MOODY,
(Paul R. Moody),

300 Frisco Building,
906 Olive Street,
St. Louis, Missouri 63101,

CABANISS, JOHNSTON, GARDNER &
CLARK,

By DRAYTON T. SCOTT,
(Drayton T. Scott),

Attorneys for Defendant, St.
Louis-San Francisco Railway
Company.

902 First National Bldg.,
Birmingham, Alabama 35203.

MOTION TO DISMISS.

Filed Sep. 29, 1965.

(Title Omitted.)

Defendant, Brotherhood of Railway Carmen of America, an unincorporated association, respectfully moves this Court to dismiss this action, and for grounds shows:

1. Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

2. Plaintiffs' Complaint complains of and brings into issue matters over which Congress has delegated exclusive jurisdiction to the National Railroad Adjustment Board.

3. Plaintiffs' Complaint on its face reveals that plaintiffs have collectively and individually failed to exhaust administrative remedies admittedly available to them.

4. Plaintiffs' Complaint has failed to allege proper Federal jurisdiction.

5. Plaintiffs' Complaint shows upon its face a lack of diversity of citizenship between all the parties in that it alleges that this defendant is an unincorporated association, which association has individual members resident in the State of residence of plaintiffs.

6. Plaintiffs' Complaint fails to allege that plaintiffs collectively or individually have exhausted contractual remedies and procedures admittedly available to them.

7. Plaintiffs' Complaint has completely failed to allege any facts or circumstances which support plaintiffs' conclusionary claim that they are entitled to work as carmen rather than carmen helpers, which position they admittedly are filling.

8. Plaintiffs have failed to allege any complaint against this defendant over which this Court has jurisdiction, the

Complaint merely alleged wrongful acts performed by co-defendant.

9. Plaintiffs' Complaint completely lacks necessary allegations to constitute a proper class action.

MULHOLLAND, HICKEY & LYMAN,
By CLARENCE MULHOLLAND,

741 National Bank Building,
Toledo, Ohio,

COOPER, MITCH, JOHNSTON &
CRAWFORD,

By JAMES A. COOPER,

Attorneys for Defendant, Brotherhood of Railway Carmen of America.

1025 Bank for Savings Building,
Birmingham, Alabama.

AMENDED MOTION TO DISMISS.

Filed Sep. 30, 1965.

(Title Omitted.)

Comes the defendant St. Louis-San Francisco Railway Company and amends its motion to dismiss heretofore filed by adding thereto the following additional grounds:

8. Plaintiffs' complaint on its face reveals that plaintiffs have failed to exhaust contractual grievance procedures.

9. Plaintiffs' complaint on its face reveals that plaintiffs have not requested co-defendant, Brotherhood of Railway Carmen of America, to pursue on their behalf

any grievance procedures contained in agreements between the defendants.

10. Plaintiffs' complaint on its face reveals that plaintiffs have not requested co-defendant, Brotherhood of Railway Carmen of America, to pursue on their behalf any grievance procedures contained in agreement between the defendants and that co-defendant, Brotherhood of Railway Carmen of America, if requested, failed to do so.

11. Plaintiffs' complaint on its face reveals that plaintiffs have not requested co-defendant, Brotherhood of Railway Carmen of America, to pursue on their behalf any grievance procedures contained in agreement between the defendants and that co-defendant, Brotherhood of Railway Carmen of America, if requested, failed to do so and that if requested and co-defendant, Brotherhood of Railway Carmen of America, failed to do so, plaintiffs pursued a complaint for failure to do so through the internal grievance procedure of co-defendant, Brotherhood of Railway Carmen of America.

PAUL R. MOODY,
(Paul R. Moody),

300 Frisco Building,
906 Olive Street,
St. Louis, Mo. 63101.

CABANISS, JOHNSTON, GARDNER &
CLARK,

By DRAYTON T. SCOTT,
(Drayton T. Scott),

Attorneys for Defendant, St.
Louis-San Francisco Railway
Company.

902 First National Bldg.,
Birmingham, Ala. 35203.

AMENDED MOTION TO DISMISS.

Filed September 30, 1965.

(Title Omitted.)

Defendant Brotherhood of Railway Carmen of America, an unincorporated association, by leave of Court first had, amended its motion to dismiss, in the following particulars only, by adding:

10. Plaintiffs' complaint on its face discloses that plaintiffs have not requested this defendant to process any grievance on their behalf; have failed to pursue remedies available to them through the internal grievance procedure of the applicable collective bargaining agreement; and have failed to pursue any complaint for failure of this defendant to process any grievance through the applicable internal grievance procedure or appeals procedure available within the union, and have not exhausted the appeals procedure available within the union.

MULHOLLAND, HICKEY & LYMAN,
By **CLARENCE MULHOLLAND,**

741 National Bank Building,
Toledo, Ohio.

**COOPER, MITCH, JOHNSTON &
CRAWFORD,**

By **JEROME A. COOPER,**
Attorneys for Defendant, Brotherhood of Railway Carmen of America.

1025 Bank For Savings Building,
Birmingham, Alabama.

MEMORANDUM OPINION.

Filed Jul. 28, 1966.

(Title Omitted.)

This cause, coming on to be heard, was submitted upon the respective motions of the defendants to dismiss this action and upon the briefs and oral arguments of counsel.

Instituted as a class action, plaintiffs assert that this Court has jurisdiction both because of diversity of citizenship and the presence of a federal question.

The allegations of fact in the complaint may be briefly summarized. (1) Plaintiffs are employed by defendant railroad as carmen helpers, known as "Upgrade Carmen" and, although qualified by experience to be carmen, none have been promoted to that classification. (2) Plaintiffs are represented by defendant Union and their employment rights are covered by a collective bargaining agreement negotiated by defendant Union. (3) Defendants have conspired to avoid calling certain Negro plaintiffs to perform work and since the white plaintiffs stand below the Negro plaintiffs on the seniority roster all are thereby being discriminated against. (4) Defendant Railroad uses "apprentices" to perform work in lieu of calling out plaintiffs.

Alleging that they are the victims of an invidious racial discrimination and that each has lost wages in excess of ten thousand dollars as a result thereof, plaintiffs pray for equitable relief enjoining defendants to cease and desist from such discrimination in all its aspects and for award of individual damages.

It affirmatively appears from averments in the complaint that plaintiffs have not availed themselves of remedies provided by grievance machinery in the collective bargaining agreement, the grievance machinery in the constitution of the Brotherhood, and the procedure before the National Railroad Adjustment Board.

This Court is of the opinion that such remedies are to be pursued as a prerequisite to relief in the federal Courts. *Neal v. System Board of Adjustment* (Mo. Pac. R.), 348 F. 2d 722 (8th Cir. 1965); *Wade v. Southern Pacific Co.*, 243 F. Supp. 307 (S. D. Texas 1965); cf. *Haynes v. U. S. Pipe & Foundry Co.*, ... F. 2d ... (5th Cir. 6-14-66, No. 22727).

The conclusory averment that because of the nature of their claim and the failure of defendant Brotherhood to institute any grievance on their behalf such remedies are wholly inadequate is not equivalent to a contention that they are unavailable. To indulge such a presupposition would be to sterilize procedures adopted to promote industrial peace.

It is noteworthy that there is presently pending on the docket of this Court Civil Action No. 66-65, styled *James C. Dent v. St. Louis-San Francisco Railway Company, et al.*, brought under Title VII of the Civil Rights Act, 42 U. S. C. A., § 2000e, wherein identical relief is sought for members of the class represented by the plaintiffs herein.

For failure of the complaint to state a claim upon which relief can be granted an order will be entered dismissing this action.

Done, this the 28th day of July, 1966.

SEYBOURN H. LYNNE,
Chief Judge.

A True Copy.

WILLIAM E. DAVIS,
Clerk, United States District Court,
Northern District of Alabama,
By MARY L. TORTORICI,
Deputy Clerk.

(Seal)

ORDER.

Filed July 28, 1966.

(Title Omitted.)

In conformity with the memorandum opinion of the Court contemporaneously entered herein:

It Is Ordered, Adjudged and Decreed by the Court that this action be and the same is hereby dismissed without prejudice.

Done, this the 28th day of July, 1966.

SEYBOURN H. LYNNE,
Chief Judge.

A True Copy.

WILLIAM E. DAVIS,
Clerk, United States District
Court, Northern District of
Alabama,

By MARY L. TORTORICI,
Deputy Clerk.

(Seal)

**MOTION TO SET ASIDE OR TO AMEND ORDER
OF DISMISSAL.**

Filed Aug. 4, 1966.

(Title Omitted.)

Come now all plaintiffs in the above styled cause and respectfully show unto the Honorable Court and aver as follows:

1. In plaintiffs' brief in opposition to the motions to dismiss, plaintiffs said in conclusion as follows:

If the Court should disagree with this brief and should agree with defendants' contention that the complaint is insufficient to demonstrate jurisdiction, then plaintiffs respectfully request that the order of this Court set out wherein the complaint is insufficient and that the Court allow plaintiffs time within which to amend their complaint to supply any deficiencies.

2. Certain of the alleged deficiencies relied upon by the Court in the Decree of Dismissal entered on, to-wit, July 28, 1966, can be obviated by averments to be contained in a proposed amendment to the complaint, more particularly, averments to the effect that plaintiffs did make bona fide but unsuccessful and frustrating attempts to avail themselves of the purported administrative remedies provided by the Union constitution and the collective bargaining agreement.

Wherefore Premises Considered, plaintiffs respectfully move that the order of Dismissal entered on, to-wit, July 28, 1966 be set aside or appropriately amended for the sole and limited purpose of allowing plaintiffs a reasonable time within which to amend their complaint.

WILLIAM M. ACKER JR.,
(William M. Acker, Jr.),
CARL ISAACS,
(Carl Isaacs),
Attorneys for Plaintiffs.

Of Counsel:

SMYER, WHITE, REID &
ACKER,
600 Title Building,
Birmingham, Alabama.

ORDER.

Filed September 19, 1966.

(Title Omitted.)

This cause, coming on to be heard, was submitted upon the motion filed in behalf of plaintiffs to set aside or to amend the order of dismissal entered herein on July 28, 1966, in conformity with the memorandum opinion contemporaneously entered therewith. Treating such motion as a motion to amend the complaint to cure the defects points out in such memorandum opinion:

It is Ordered, Adjudged and Decreed by the Court that plaintiffs are granted leave to amend their complaint on or before September 30, 1966, if they are so advised.

Done, this the 16th day of September, 1966.

SEYBOURN H. LYNNE,
Chief Judge.

AMENDMENT TO COMPLAINT.

Filed Sep. 29, 1966.

(Title Omitted.)

Comes now James G. Glover, James C. Dent, William H. Greene, Jr., Paul Cain, Odell Barmore, Carey Gooden, Matthew C. Payne, John E. Jeffries, Albert L. Boyd, Buster Wright, Vincent P. Piazza, Jimmie O. Wiley,

Howard D. Keplinger, Jr., and Sam G. Gugliotta, plaintiffs in the above styled cause, and, with leave of the Court already had and obtained, amend their complaint by changing paragraph 7 thereof so that it will read as follows:

7. On many occasions the Negro plaintiffs through one or more of their number, have complained both to representatives of the Brotherhood and to representatives of the Company about the foregoing discrimination and violation of the Collective Bargaining Agreement. Said Negro plaintiffs have also called upon the Brotherhood to process a grievance on their behalf with the Company under the machinery provided by the Collective Bargaining Agreement. Although a representative of the Brotherhood once indicated to the Negro plaintiffs that the Brotherhood would "investigate the situation", nothing concrete was ever done by the Brotherhood and no grievance was ever filed. Other representatives of the Brotherhood told the Negro plaintiffs time and time again: (a) that they were kidding themselves if they thought they could ever get white men's jobs; (b) that nothing would ever be done for them; and (c) that to file a formal complaint with the Brotherhood or with the Company would be a waste of their time. They were told the same things by local representatives of the Company. They were treated with condescension by both Brotherhood and Company, sometimes laughed at and sometimes "cussed", but never taken seriously. When the white plaintiffs brought their plight to the attention of the Brotherhood, they got substantially the same treatment which the Negro plaintiffs received, except that they were called "nigger lovers" and were told that they were just inviting trouble. Both defendants attempted to intimidate plaintiffs, Negro and white. Plaintiffs have been completely frustrated in their efforts to present their grievance either to the Brotherhood or to the Company. In addition, to employ the

purported internal complaint machinery within the Brotherhood itself would only add to plaintiffs' frustration and, if ever possible to pursue it to a final conclusion it would take years. To process a grievance with the Company without the cooperation of the Brotherhood would be a useless formality. To take the grievance before the National Railroad Adjustment Board (a tribunal composed of paid representatives from the Companies and the Brotherhoods) would consume an average time of five years, and would be completely futile under the instant circumstances where the Company and the Brotherhood are working "hand-in-glove". All of these purported administrative remedies are wholly inadequate, and to require their complete exhaustion would simply add to plaintiffs' expense and frustration, would exhaust plaintiffs, and would amount to a denial of "due process of law", prohibited by the Constitution of the United States.

WILLIAM M. ACKER, JR.,
(William M. Acker, Jr.),
CARL ISAACS,
(Carl Isaacs),
Attorneys for Plaintiffs.

Of Counsel:

**SMYER, WHITE, REID &
ACKER,**
6th Floor, Title Building,
Birmingham, Alabama.

**MOTION TO DISMISS AMENDMENT TO COMPLAINT
AND TO ADHERE TO ORDER OF DISMISSAL.**

Filed Oct. 12, 1966.

(Title Omitted.)

Comes now St. Louis-San Francisco Railway Company, one of the defendants in this cause, and moves that the Amendment to Complaint be dismissed, that the Order of Dismissal entered by the Court in this cause on July 28, 1966 be adhered to, and that the Complaint as last amended be dismissed, and as grounds therefor, asserts as follows, separately and severally:

1. The allegations of the Amendment to Complaint do not cure the defects of the Complaint, pointed out in the Court's Memorandum Opinion of July 28, 1966, that "plaintiffs have not availed themselves of remedies provided by the grievance machinery in the collective bargaining agreement, the grievance machinery in the constitution of the Brotherhood, and the procedure before the National Railroad Adjustment Board."
2. The allegations of the Amendment to Complaint are no more than conclusionary averments of alleged futility and not the unavailability of remedies which must exist in order to justify their disregard.
3. It affirmatively appears from the allegations of the Amendment to Complaint that "no grievance was ever filed" under the grievance procedure of the collective bargaining agreement, although the plaintiffs could have done so and may do so.
4. The allegations of the Amendment to Complaint show on their face that the plaintiffs have not attempted to

pursue their internal remedies within the Brotherhood, that they have not attempted to process a grievance with this defendant, and that they have not attempted to pursue their remedies before the National Railroad Adjustment Board.

6. The allegations of the Amendment to Complaint show on their face that the plaintiffs have not collectively and individually pursued or exhausted the administrative remedies admittedly available to them and instead seek to justify their disregard by averments of alleged futility and alleged time involved in the use of such remedies.

DRAYTON T. SCOTT,
(Drayton T. Scott),
WILLIAM F. GARDNER,
(William F. Gardner),
PAUL R. MOODY,
(Paul R. Moody),
CABANISS, JOHNSTON,
GARDNER & CLARK.

901 First National Building,
Birmingham, Alabama.

MOTION TO DISMISS AMENDMENT TO COMPLAINT.

Filed Oct. 19, 1966.

(Title Omitted.)

Comes now defendant Brotherhood of Railway Carmen of America, an unincorporated association, and files this motion to dismiss the complaint as last amended, and as grounds therefor shows:

1. The amendment to the complaint fails to allege sufficient facts to establish that plaintiffs have availed themselves, as set forth in the Court's Memorandum Opinion of July 28, 1966, "of remedies provided by grievance machinery in the collective bargaining agreement, the grievance machinery in the constitution of the Brotherhood, and the procedure before the National Railroad Adjustment Board."

2. The amendment to the complaint fails to allege facts to establish that the plaintiffs have separately or collectively exhausted administrative remedies available to them by virtue of the contract, grievance machinery and constitution of this defendant and by law before the National Railroad Adjustment Board and does not allege facts that would relieve plaintiffs of such failure.

MULHOLLAND, HICKEY & LYMAN,
By **DONALD W. FISHER, ESQ.,**

741 National Bank Building,
Toledo, Ohio 43604.

COOPER, MITCH & CRAWFORD,
By **JEROME A. COOPER,**

Attorneys for Defendant, Brotherhood of Railway Carmen of America.

1025 Bank for Savings Bldg.,
Birmingham, Alabama.

ORDER.

Filed November 8, 1966.

(Title Omitted.)

This cause, coming on to be heard, was submitted to the Court on defendants' motions to dismiss the complaint as amended.

Upon consideration of said motions, and it appearing to the Court that the amendment to the complaint filed herein on September 29, 1966, does not cure the defects pointed out in the memorandum opinion of this Court entered herein on July 28, 1966, it is the opinion of the Court that this action is due to be dismissed.

Accordingly, it is Ordered, Adjudged and Decreed by the Court that this action be and the same is hereby dismissed.

Done, this the 7th day of November, 1966.

SEYBOURN H. LYNNE,
Chief Judge.

A True Copy.

WILLIAM E. DAVIS,
Clerk, United States District
Court, Northern District
of Alabama.

By MARY L. TORTORICI,
Deputy Clerk.

(Seal)

NOTICE OF APPEAL.

Filed Nov. 28, 1966.

**In the United States District Court for the Northern
District of Alabama, Southern Division.**

James G. Glover, et al., Plaintiffs,

vs.

Civil Action No. 65-477.

**St. Louis-San Francisco Railway Company, et al.,
Defendants.**

Come now James G. Glover, James C. Dent, William H. Green, Jr., Paul Cain, Odell Barmore, Carey Gooden, Matthew Payne, John E. Jeffries, Albert L. Boyd, Buster Wright, Vincent P. Piazza, Jimmie O. Wiley, Howard D. Keplinger, Jr., and Sam B. Gugliotta and respectfully appeal to the United States Court of Appeals for the Fifth Circuit from the judgment and decree entered in this cause, on, to-wit, November 7, 1966, sustaining defendants' motion to dismiss and dismissing the complaint as amended. Plaintiffs-Appellants hereby request the Clerk to mail copies of this notice in accordance with Rule 73 (b) of the Federal Rules of Civil Procedure.

WILLIAM M. ACKER, JR.,

(William M. Acker, Jr.),

CARL ISAACS, JR.,

(Carl Isaacs, Jr.)

Attorneys for Plaintiffs-Appellants.

APPEAL BOND.

Filed Nov. 28, 1966.

(Title Omitted.)

**State of Alabama,
Jefferson County.**

We, the undersigned, jointly and severally, hereby acknowledge ourselves security for costs of the appeal in this cause to the United States Circuit Court of Appeals for the Fifth Circuit up to and including the sum of Two Hundred Fifty and no/100 (\$250.00) Dollars. We hereby agree to pay all appeal costs not exceeding said sum if the appeal is dismissed or the judgment affirmed (or such costs as the appellate Court may award if the judgment is modified).

**JAMES G. GLOVER,
JAMES C. DENT,
WILLIAM H. GREEN, JR.,
PAUL CAIN,
ODELL BARMORE,
CAREY GOODEN,
MATTHEW PAYNE,
JOHN E. JEFFRIES,
ALBERT L. BOYD,
BUSTER WRIGHT,
VINCENT P. PIAZZA,
JIMMIE O. WILEY,
HOWARD D. KEPLINGER, JR.,
SAM G. GUGLIOTTA,**

**By WILLIAM M. ACKER, JR., (L.S.),
(William M. Acker, Jr.),
Attorney-in-Fact,
SHUFORD B. SMYER, (L.S.),
(Shuford B. Smyer),
CARL ISAACS, JR., (L.S.),
(Carl Isaacs, Jr.).**

CLERK'S CERTIFICATE.

United States of America,
Northern District of Alabama.

I, WILLIAM E. DAVIS, Clerk of the United States District Court for the Northern District of Alabama do hereby certify that the foregoing pages numbered from one (1) to thirty-one (31), both inclusive, comprise the original pleadings in the foregoing civil action and are herewith attached as a full, true and correct transcript of the record on appeal in the Matter of James G. Glover, et al., Appellants, vs. St. Louis-San Francisco Railway Company, et al., Appellees, Civil Action 65-477, Southern Division, as fully as the same appears of record and on file in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of said Court at Birmingham, Alabama, in said District, on this the 1st day of December, 1966.

WILLIAM E. DAVIS,
(William E. Davis),
Clerk, United States
District Court.

(Seal)

OPINION.

In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 24288

JAMES G. GLOVER, ET. AL.,

Appellants,

versus

**ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
ET AL.,**

Appellees.

Appeal from the United States District Court for the
Northern District of Alabama.

(December 5, 1967.)

Before RIVES, GOLDBERG and DYER, Circuit Judges.

PER CURIAM: We agree with the opinion and decision of the district court. In addition to the authorities there cited, see *Republic Steel Corporation v. Maddox*, 1965, 379 U.S. 650; *Walker v. Southern Railway Co.*, 1966, 385 U.S. 196, *Vaca v. Sipes*, 1967, 386 U.S. 171; *Steen v. Local Union No. 163*, 6 Cir. 1967, 373 F.2d 519; *Howard v. St. Louis-San Francisco Railway Co.*, 8 Cir. 1966, 361 F.2d 905. The judgment is

AFFIRMED.

JUDGMENT.

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

October Term, 1967

No. 24288

D. C. Docket No. CA 65-477

JAMES G. GLOVER, ET AL.,

Appellants,

versus

**ST. LOUIS-SAN FRANCISCO RAILWAY
COMPANY, ET AL.,**

Appellees.

**Appeal from the United States District Court for the
Northern District of Alabama.**

Before RIVES, GOLDBERG and DYER, Circuit Judges.

**This cause came on to be heard on the transcript of the
record from the United States District Court for the
Northern District of Alabama, and was argued by counsel;**

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, James G. Glover, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

December 5, 1967.

Issued as Mandate: Dec. 27, 1967.

Certificate of Service.

I, William M. Acker, Jr., of counsel for petitioners, hereby certify that I have mailed by U. S. Mail, postage pre-paid; three (3) copies of the foregoing appendix to Messrs. Cabaniss, Johnston, Gardner & Clark, First National Building, Birmingham, Alabama 35203, attorneys-of-record for St. Louis-San Francisco Railway Co. and three (3) copies to Messrs. Cooper, Mitch & Crawford, Bank for Savings Building, Birmingham, Alabama 35203, attorneys-of-record for Brotherhood of Railway Carmen of America, this ... day of June, 1968.

.....
William M. Acker, Jr.